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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Ex Parte No. 698

***ESTABLISHMENT OF THE TOXIC BY INHALATION HAZARD COMMON CARRIER  
TRANSPORTATION ADVISORY COMMITTEE***

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**Comments of**

**The Dow Chemical Company**

The Dow Chemical Company ("Dow") hereby submits these Comments in response to the "Notice of Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee" ("Notice"), served by the Surface Transportation Board ("Board") in this docket on August 3, 2010. The Board proposes to establish a Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee ("Advisory Committee") pursuant to the Federal Advisory Committee Act. The Notice outlines the proposed structure and composition of the Advisory Committee. The Committee would "be tasked with producing a report and recommendations on how the Board should balance the common carrier obligation to transport [toxic inhalation hazards ("TIHs")] with the risk of catastrophic liability in setting appropriate rail transportation liability terms for TIH cargo." Dow welcomes this opportunity to comment on the proposed scope and structure of the Advisory Committee.

**I. INTEREST OF DOW**

Dow is a diversified chemical company that combines the power of science and technology with the "Human Element" to passionately innovate what is essential to human progress. Dow offers a broad range of technology-based products and solutions to customers in

approximately 160 countries, helping them to provide everything from fresh water, food and pharmaceuticals to paints, packaging and personal care products. In order to provide many of these essential products and services, Dow both produces and uses hazardous materials, including TIH commodities. The broad range of products that Dow produces span virtually every industry and make possible approximately 90% of the goods people use every day.

Dow has developed a culture of safety and responsibility that pervades all of its activities. This culture has generated a long track record of innovation and investment to improve Dow's safety performance in the production, use and transportation of hazardous materials.

Dow recognizes the risks inherent in transporting hazardous materials and is continually designing and re-designing its supply chain to minimize those risks. This includes efforts to reduce or eliminate the shipment of highly hazardous materials, continually optimize sourcing and distribution networks for those materials, improve the integrity and survivability of shipping containers, monitor their location and condition in transit, and enable effective community emergency preparedness and response along transportation routes. Dow's collaborative efforts with carriers across all transportation modes have achieved an incident-free rate of 99.97 percent and earned it award recognition from Norfolk Southern, CSX, Canadian Pacific, Canadian National and BNSF for leadership and performance in safety practices.

In the spirit of Dow's history of working collaboratively with carriers to improve and enhance the safe transportation of hazardous materials, Dow welcomes the opportunity to comment upon, and participate in, the activities of the Advisory Committee.

## **II. DOW COMMENTS**

Dow lauds the objectives of the Board in establishing the Advisory Committee for the purpose of addressing the difficult task of reconciling rail carrier TIH liability concerns with the common carrier obligation. However, we recognize that the Committee will face the very same issues that have made this such a difficult task in the past. Further, it is not clear from the Notice that the Committee structure will facilitate the Board's objectives where other efforts have been stymied.

### **A. Antitrust Concerns**

The single greatest obstacle to fulfilling the Committee's mandate is the antitrust laws. Unfortunately, the Notice does not acknowledge this obstacle, nor suggest how the Committee will be able to fulfill its mandate within the boundaries established by the antitrust laws. Unless antitrust considerations are addressed very early in the process, the Committee's efforts could fall victim to the same fate as previous, well-intentioned private and public initiatives.

Dow is a member of both the American Chemistry Council ("ACC") and The Chlorine Institute, which have addressed the antitrust issue in greater detail. Dow urges the Board to consult with the U.S. Department of Justice to scope out the permissible boundaries of interaction among Committee members, and then to seek public comment upon the proper scope and utility of the Committee within those boundaries.

### **B. The Committee's Mandate**

The Board has requested specific comments upon the appropriate scope of the Advisory Committee's mandate, and how that scope would affect the Committee's utility. The Committee's mandate should not encompass any curtailment of the common carrier obligation. Such changes can only be made by Congress, and thus would be beyond the Board's ability to

implement. Furthermore, as presented in Dow's comments in Ex Parte No. 677 (Sub No. 1) and Finance Docket No. 35219, which Dow incorporates herein by reference, the Board must interpret and apply the common carrier obligation within the existing framework of statutes and both judicial and agency precedent. Therefore, the scope of the Committee's mandate should focus upon ways to minimize the liability risks of carriers when transporting TIH, without reducing either the safety of such transportation or the scope of the common carrier obligation.

Because liability and safety issues are integral parts of a comprehensive risk management strategy, this Advisory Committee cannot fulfill its mandate without the participation of the U.S. Department of Transportation ("USDOT"), and particularly the Federal Railroad Administration ("FRA") and the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). Only those agencies have the statutory authority to act on rail safety matters. Dow believes it is preferable, and perhaps even necessary, for the USDOT to be a partner with the STB as a sponsoring agency. Without USDOT's full participation, it is unlikely the Committee will be able to address opportunities to minimize liability in a holistic fashion. Further, since the Advisory Committee's recommendations could include safety matters that are within the jurisdiction of FRA or PHMSA, we believe that those agencies should be invited to participate as co-sponsors of the Advisory Committee.

Finally, the Notice appears to reflect a preliminary determination by the Board that a shared liability scheme is the likely outcome of the Advisory Committee's recommendations. Indeed, the proposal to include two insurance industry representatives as voting members of the Committee seems to demonstrate a predilection towards such a recommendation. While shared liability arrangements have been explored between shippers and railroads as private commercial initiatives in recent years, those discussions did not bear fruit. Perhaps the Board hopes that the

Committee will resuscitate those discussions. At this time, however, Dow believes that it is premature to give such emphasis to this one option. The Board should clarify that the Committee's mandate is not to focus upon any single pre-conceived recommendation and it should not structure the Committee in a manner that appears to favor that option.

### **C. Committee Membership and Qualifications**

The size of the Committee should be sufficient to represent all stakeholders, but not too large as to be unwieldy. In order to accomplish both objectives, the Committee is likely to require working sub-committees, which should be recognized in the Committee's charter.

Dow fully supports the equal representation of shippers and railroads. Moreover, Dow agrees with the Board's proposal that any recommendation of the Committee must have the support of a majority of both the shipper and railroad representatives, in order to ensure that a consensus recommendation is achieved. Further, Dow believes that the Advisory Committee should be co-chaired by a representative of the TIH shipper and customer group and a representative of the railroads – to further help ensure consensus can be achieved.

Dow believes that the allocation of shipper representation should be proportionate to the volumes of the various TIH commodities that are transported by rail. The Notice proposes to split that representation evenly between anhydrous ammonia and chlorine shippers. A proportionate division, however, would reflect that 45% of rail TIH shipments are anhydrous ammonia, 35% are chlorine, 10% are ethylene oxide, and the remaining 10% are other TIH commodities. This representation can be achieved, without significantly increasing the size of the Committee, if some Committee members wear multiple hats. For example, Dow ships chlorine and ethylene oxide, as well as two other TIH commodities.

Dow also believes that it would be desirable to include TIH customers on the Committee. There are potential recommendations that could implicate their interests. They also may have perspectives that are not shared by either shippers or railroads. Dow notes that some TIH customers, like Dow, are also TIH shippers. Dow purchases a number of TIH materials from external suppliers – such as methyl mercaptan, sulfur dioxide and hydrogen fluoride – which are delivered by rail for use in Dow manufacturing processes. Therefore, a single representative on the Committee could represent both TIH producer and user interests without unduly increasing the size of the Committee.

Although Dow agrees that academic and policy representatives, and insurance industry representatives, can provide valuable technical knowledge to assist the work of the Advisory Committee, Dow does not believe they should be voting members. Insurance industry participation, in particular, could inject an undesirable bias in the Committee's recommendations, because the insurance industry could be a financial beneficiary of some recommendations that the Committee might make. Voting membership should be restricted to direct stakeholders in the liability issue (i.e. those who are likely to bear the costs of implementation), which are TIH shippers, TIH customers, railroads, and tank car manufacturers.

Finally, Dow does not believe that Committee membership should be based upon job titles. Rather, membership should be based upon the value that a nominee brings to the table in terms of their expertise, experience, and ability to make binding commitments on behalf of their organization. That person may not always be someone at the Vice President or General Counsel level.

#### **D. Confidentiality Issues**

The Notice is silent as to how confidential information will be protected. Dow notes that the Federal Advisory Committee Act ("FACA") requires that all Committee meetings be open to the public, minutes shall be kept, and all work papers, records, and other documents be made available for public inspection. 5 U.S.C. app. 10. It is conceivable, however, that much of this material could contain confidential, proprietary or security-sensitive information. It will be difficult enough to figure out how to share such information with other Committee members in confidence, and under the antitrust laws, without also having to worry that confidential information may be shared with the general public.

Dow notes that there are provisions in both the FACA and its implementing regulations for holding closed meetings and for preserving the confidentiality of information. For example, the STB Chairman can close meetings to the public in accordance with 5 U.S.C. 552b(c). See 5 U.S.C. 10(d) and 41 C.F.R. 102-3.155. In addition, subcommittees or working groups are not subject to the requirements of the full Committee, so long as the subcommittee does not report directly to the STB. 41 C.F.R. 102-3.35 and 102-3.70(c). The ability and willingness of the STB to use these provisions will be essential to the efficacy of the Advisory Committee.

#### **III. CONCLUSION**

Dow supports the Board's objectives in establishing the Advisory Committee. Dow remains concerned, however, that there are potentially significant obstacles to the utility of the Committee, such as antitrust issues and the essential role of USDOT. Such obstacles need to be addressed very early in the process. Dow agrees with the overall proposed structure and composition of the Committee, but believes that voting membership should be restricted to direct stakeholders. Further, Dow believes that representation of TIH shipper and customer industry

segments should be apportioned roughly in accordance with actual TIH rail volumes shipped and received. Finally, Dow believes that membership should not be based upon job titles, and confidential information must be protected from public disclosure.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David E. Kepler', is written over the printed name.

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